No. 09-1426

JUL 21 2010

IN THE

Supreme Court of the United States

CITY OF NEW YORK and PAUL GIBLIN,

Petitioners,

—v.—

SUSAN ROSS GREEN, Executrix of the Estate of Walter Green, deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent Susan Ross Green, as Executrix of the Estate of Walter Green, deceased, respectfully asks this Court to deny the petition for writ of certiorari to review two judgments by the United States Court of Appeals for the Second Circuit.

Introduction

Petitioners have presented no compelling reasons for this Court to review the decisions of the Second Circuit. They request review of the claim asserted here for the first time—that the Americans with Disabilities Act, 42 U.S.C. §12131 *et seq.* ("ADA") simply should not apply to emergency medical service ("EMS") workers in "exigent circumstances." (Petitioners' Brief at *i*, 12, 17) Their application should be denied: first, because it was not raised during the 9 years this case has been pending in the district court and the Second Circuit. Second, the decisions of the Second Circuit are not in conflict with a decision of this Court or other circuits. No court has recognized the type of sweeping exception for emergency medical services workers proposed by petitioners; instead, courts have uniformly concluded that a finding of discrimination calls for an intensive fact-based inquiry. Third, any exception that would encompass the facts of this case would effectively revoke the applicability of the ADA to emergency medical services workers and subject persons suffering from disabilities to stereotypical treatment based on untested paternalism, in direct violation of the statute and the decisions of this Court.

Finally, there is no reason for review on the ground that the Second Circuit has "so far departed from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10 (a) The judgments of the Second Circuit were judicious, reasoned and wholly in accord with settled law. It is petitioners who have strayed into the realm of fantasy in their 'Statement of the Case' (Pet. Brief at 3-11), which bears almost no resemblance to the record of the events of March 19, 2000. The evidence adduced at trial demonstrated that Walter Green's life was never "at stake" during the 90 minutes that the 5 emergency medical services workers and 3 police officers were in Green's apartment, nor did the presence of the officers there for an hour and a half deprive any other New Yorkers from needed services. Moreover, the EMS officers did not save Green's life: he had been resuscitated by his wife before EMS arrived at his door, and was "breathing", as he often did, via manual ventilation provided by his wife and teenage daughter, while waiting for his ventilator repair technician who was en-route to his apartment.

Walter Green had organized his affairs so that he could be cared for at home, despite suffering from late stage amyotrophic lateral sclerosis ("ALS" or "Lou Gehrig's disease"). During the entirety of the hour and a half of the standoff in his apartment, Walter Green's condition was under control: he was no more in "*extremis*" then than he was a day or a week before. He was, by the City's own documentary evidence, "alert and oriented" and communicating repeatedly that he did not want to go to the hospital.

An evaluation of his "decisional capacity" to refuse further treatment was required by the City's own guidelines and, the evidence showed, it would have been feasible, quick and easily performed. It was not done because petitioners concluded that they knew better than Walter Green what he needed.

Statement of Facts

On March 19, 2000, Walter Green, a 61 year old Manhattan resident, suffered from ALS, a progressive and invariably fatal neuromuscular disease. He had been diagnosed some years earlier and was, by then, in the late stages of the disease. He could not ambulate, speak with his voice, or breathe on his own. He was confined to a wheelchair and required full-time use of a mechanical ventilator (respirator) attached to a tracheotomy tube at the base of his neck. (Materials in the Joint Appendix submitted to the Second Circuit are cited as "CA"-137 at 29)

Despite his disease, Walter led an active life: in November 1998 he participated as a wheel chair entrant in the NYC Marathon. (CA 514) He rode to Washington D.C. with 'Ride for Life,' to draw attention to the need for additional funding for ALS sufferers. (CA-515; CA-141) He participated fully in the life of his family and community. As William Hill, Walter's respiratory therapist testified:

> Q: During the time you took care of Walter Green did he just stay in his house and live there?

A: No, not Walter.

Q: What do you mean by that?

A: Walter was a very vibrant personality and he was a very vibrant person before he contracted ALS and he was determined not to let ALS stop him from living his life. And so Walter – part of our discharge plan was talking to Walter about what his expectations were and what we could do for him. And so he wanted to be able to leave his house, he wanted to be able to go to ball games, he wanted to be able to go to the park, he wanted to be able to go down to the ice cream parlor if he wanted to. Not that he could eat ice cream, but he wanted to be able to have the option of going if his daughter wanted to go. So we had to set Walter up so that he could leave the house and he could go where he wanted to go.

Q: How did you do that?

A: We set his wheelchair up with one of the ventilators, one of the LP 10s [mechanical ventilator] and we put it on a special tray with a special battery. And, we mounted it to the wheelchair so that he could hit a bump and the wheelchair would stay on, or if he could be tilted and it would stay on. And that

way, he could go wherever he wanted to go.

Q: Do you know if he did go places outside his home?

A: Yes.

Q: How do you know that?

A: I talked to Walter about it. Initially, whenever he was going to leave the home, he would let me know and ask me if it is okay if I go this far or that far because he was concerned about the batteries on the wheelchair and for the vent, and he wanted to make sure that it didn't create a problem for his family when he went out, so he wanted to be safe. Once Walter got the hang of it, he knew where to go. He didn't ask me or anyone else. He just went.

(CA-140 at 43-44)

At the time he became wholly ventilator dependent in 1997, Walter was hospitalized to have a tracheotomy to accommodate the ventilator and resolved then never to return to any hospital for any medical in-patient care. (CA-142 at 49; CA-199 at 224; CA-373 at 741) Except for the day in question, when he was forcibly removed from his home to hospital, his decision was honored and he died at home on December 9, 2001. (CA-212 at 276) Walter and his family received extensive medical and

mechanical training in airway maintenance, including suctioning, the operation and maintenance of the ventilators, and the operation of back up or emergency ventilation systems. (CA-137 at 29, 31-32) Because all machines fail, the family was thoroughly trained in using a manually operated self-inflating bag ("ambu bag") to pump air into Walter's lungs. (CA-139 at 38-39) This apparatus was used by the family on numerous occasions, including a 3 hour stretch when the ventilator battery gave out during a trans-Atlantic flight. (CA-141 at 47; CA-200 at 227-228)

As his illness progressed, Walter became dependent on eye blinks to signal "yes" or "no," or for more detailed conversation, on his computer to communicate. Walter had a voice augmentation system, with a software program that sped up communication so that Walter had simply to type one or two letters with his one active finger and a choice of likely words popped up for him to select. After completion of a sentence or thought, Walter highlighted it and the computer voice was activated and 'spoke' the words typed. (CA-160 at 124; CA-162 at 30) With this system Walter was able to carry on detailed conversations, including four days of deposition by petitioners' counsel. (CA-280-6)

A. Walter's Breathing Problem and the 911 Call

On March 19, 2000 Walter was suffering from one of the several bouts of pneumonia that he had experienced, and treated at home, since going on the

ventilator in 1997. He testified that this infection "was relatively minor compared to the other infections that home care has cured." (CA-375 at 749) Susan Green and their 14 year old daughter, Alixandra, left their apartment for some errands in the early afternoon, leaving Walter with a part-time nurse's aid, Marcella Lopez. When Walter experienced difficulty breathing, Marcella called Susan and Alixandra. (CA-201 at 232) Alixandra immediately returned to the apartment and found the ventilator beeping and her father in distress. "My father looked like he was passed out . . . his eyes were rolled back into his head."(CA-202 at 233) She perceived that there was a blockage, preventing her father from receiving air via his respirator, but, because she was unable to find the self inflating (ambu) bag, she and the nurse's aid began to blow air directly into her father's trachea through the tracheotomy. She called 911 for help. Within minutes, Susan Green arrived in the apartment, found the ambu bag (which had fallen behind a cabinet) and started manually ventilating Walter. (CA-203 at 237-8)

Alixandra testified that she and her mother used the suction machine and were able to suction mucus from Walter's trachea, that Walter soon regained consciousness and communicated with them, and that his color returned, all prior to the arrival of the EMS workers. (CA 238 at 240) This crucial testimony as to the sequence of events in controversy was corroborated by the play back of the tape of the actual 911 call made by Alixandra.

During the play back, Alixandra interpreted some of the background noises audible on the tape, including the activation of the suction machine. (CA-206 at 249-250) As the jury listened to the tape recorded emergency call, the City's 911 operators were clearly heard to acknowledge that the Green family had been able to revive Walter before the arrival of EMS, at 2:48 p.m. (CA-717-720) Chris Collins, one of the paramedics, corroborated this by reporting to the City's on-line medical control staff: "when we got there, the patient's family was bagging him". (CA-732; CA 203 at 240)

As was heard and transcribed on the 911 tape (CA-712-20), when the officers arrived at the Green apartment, Susan thanked them for answering the call and advised them that their services were not needed. (CA-366 at 710, 711) Her thanks went unheeded, as the EMS officers insisted they must, and did, enter the home, and threatened to "put her in protective custody or something". (CA-723)

B. Walter's Refusal of Medical Aid

Walter Green testified (at videotaped pre-trial depositions that were read and played to the jury) that he repeatedly told the officers who wanted to take him to the hospital: "I am fine. No hospital." (CA-285-6 at 482-485) This statement was both printed on the computer screen and audibly projected into the room by the voice augmentation device. Alixandra Green who was sitting next to her father during the unfolding events of March 19, 2000, testified that Walter repeated the statement "I

fine no hosp" out loud via the computer voice over and over again. (CA-205 at 245-246, 251)

At the scene, both EMS teams recorded on their ambulance call report forms at 15:20 [3:20 p.m.] that Walter was alert. The City EMS workers noted that Walter was "alert and communicating via computer and winks." (CA-687) On the tape recorded call heard by the jury and received in evidence as a transcribed document, paramedic Chris Collins told the City's on-line medical review service ("telemetry") that Walter could communicate via his computer. "All right he's got a trachea and he is being bagged [ambu-bagged]. He can communicate via computer." The telemetry paramedic responded: "Well, that's not going to help us."(CA-733, emphasis added; CA-203 at 239-40. *See* CA-379-80 at 765-6 for an explanation of the EMS recording system)

Walter testified that he told one of the officers that he refused to go to the hospital. (CA-285-6 at 482-85) Alixandra Green confirmed this. (CA-204 at 244 to CA-205 at 245-6) In addition, Walter's friend, Joan Bertin, an attorney present at the apartment that afternoon, testified that Walter communicated via computer to the officers in the room that he refused to go to the hospital. (CA-180 at 148)

According to the City's EMS written guidelines and echoed by all the City witnesses who testified at trial, every person has a right to refuse medical aid as long as he is competent to do so. (CA-694 at § 5.2.8) Once a patient refuses medical aid, the operational guidelines protocols entitled "Refusal

of Medical Aid" must be followed. (CA-231 at 351) This protocol establishes "guidelines and procedures for incidents in which patients refuse pre-hospital care and/or transport to a medical facility." (CA-690) After a patient refuses medical aid, the guidelines require the EMS personnel to assess the person's condition and his ability to make an informed decision. (CA-700)

An 'on line medical control' (also referred to as 'telemetry') division provides EMS officers with direct telephone access to an on-call physician. According to the City's guidelines, the telemetry physician must be contacted for all refusals of medical aid involving patients younger than 5 and older than 65 and for those whom the member has a "high index of suspicion"—best described as "concern for a potential surgical, medical or social condition that could result in an untoward/unfavorable outcome." (CA-692, 691)

After a screening by a paramedic, the protocol requires the on-line medical control physician to have a conversation with the patient so that the medical doctor can assess the patient's decisional capacity and the reasons for the refusal. (CA-695 § 5.3.1B) Dr. Flavio Crisari, the telemetry physician employed by the City to make refusal of medical aid determinations on March 19, 2000, testified that all people have the right to refuse treatment and transport to a hospital, even people who are very sick:

Q: Dr. Crisari, does a person have a right to refuse medical treatment?

A: I believe that's stated, yes, they do, if they are competent enough.

Q: And does a person with pneumonia have a right to refuse medical treatment?

A: If it's a person that's sick, yes, if they are competent.

Q: And a person with a fatal disease has a right to refuse medical treatment?

A: Absolutely, if they are competent.

(CA-224 at 324)

According to Dr. Crisari, a determination of competence is first and foremost an evaluation of whether the person is "alert":

Q: In order to accept a refusal of medical aid, what information did you, in March 2000, need from a patient?

A: I would need to know number one that they are alert.

Q: What do you mean by alert, Doctor?

A: Do they know—do they have a status of alertness that they know their situation present, their age, the date, the

> surroundings, what's happening to them, give me an idea that they are with us in the present time and not confused.

(CA-223 at 318-9)

Unfortunately for speech-disabled Walter Green, on-line medical control services were not available to people who were unable to use their vocal chords. (CA-223 at 319, Crisari: "Basically, I would have to speak to the person.") This restriction on the use of the telemetry system was confirmed by the contemporaneous statement of the telemetry staff persons captured on tape which was produced for trial, heard by the jury, transcribed and admitted in evidence. In response to the statement that "he can communicate via computer" made by the paramedic in the Green apartment, the telemetry staff member flatly stated: "well, that's not going to help us." (CA-733)

In situations where the patient was not able to speak, Dr. Crisari stated hypothetically, that "we would call a higher medical authority for the scene which would be the lieutenant who would go to the scene." (CA-223 at 320) The "higher medical authority" is an EMS supervisor, such as a lieutenant or captain (CA.224 at 321), not a physician. The supervisor hypothetically would "go there, assess the scene again, assess the patient" using the same criteria used by the telemetry physician. (CA-223 at 320)

When on-line medical control is not available, City policy requires the supervisor at the scene to perform a thorough assessment by "using the Refusal of Medical Aid Questionnaire and conversing with the patient." (CA- 696, 701-2) Captain Brian Milzhoff, Lt. Giblin's supervisor, conceded that the emergency medical technician on the scene must assess the patient's 'decisional capacity' in the process of considering whether to accept his refusal of medical aid. (CA-231 at 349-51) However, in the context of this case and after being briefed by Lt. Giblin about the events in the Green apartment, Captain Milzhoff admitted that Lt. Giblin did not evaluate Walter Green's decisional capacity after telemetry determined they could not participate in the evaluation of Walter's refusal of medical aid because Walter could not speak:

> Q: And you discussed with him [Giblin] his observations and judgment at the scene that led him to transport this patient against the patient's and the family's wishes, true?
>
> * * * *
>
> THE COURT: She is asking you if you had that conversation?
>
> A: Yes.
>
> Q: And did you learn from Lieutenant Giblin, who was under your supervision, whether or not Mr. Green

lacked decisional capacity in the view of Lieutenant Giblin?

* * * *

A: Say that again?

Q: Did you learn from Lieutenant Giblin that Mr. Green lacked decisional capacity?

A: No. That wasn't a factor, I don't believe.

Q: Do you know what the factor was that led to the decision to transport this patient if he did possess decisional capacity and decided not to go to the hospital?

* * * *

THE COURT .... Do you know why he was taken to the hospital?

A: He was taken to the hospital because he wasn't able to breathe on his own, and there was [sic] no medically trained professionals in the home.

Q: Even that patient had the right to exercise his RMA [refusal of medical aid], correct, refusal of medical assistance?

Q: Under your guidelines if he possessed decisional capacity, true?

* * * *

A: If he had the decisional capacity.

Q: Then he could have refused –

A: Then the RMA procedures would be in place.

Q: And do you have any information at all that Mr. Walter Green lacked decisional capacity on March 19, 2000?

A: I don't have any of that information.

(CA-231 at 352 to 232 at 353)(emphasis added)

C. The City's Failure to Provide Walter Green the Services Provided to Non-Disabled People

The evidence adduced at trial disclosed that Walter was not afforded the services provided to non-disabled people. First, he was denied telemetry services because he was not able to speak. (CA-733: "Well, that's not going to help us.") Second, Giblin admitted to Bertin that if Walter could speak, Giblin would not take him to the hospital. Bertin told the jury (as she had stated in her sworn deposition that was credited by the court in *Green v. City of New York (Green I)*, 465 F.3d 65, 77-8 (2d Cir. 2006)) about her conversation with defendant Giblin:

Q: Did he say anything else?

> A: Yes, Well, finally, I was very frustrated and I asked him if Walter could say, No I don't want to go to the hospital, would you then take him? And he said no, he would not.

(CA-181 at 152)

Lt. Giblin's admission was never recanted, denied, or in any way repudiated or explained away during the trial. Counsel for the City never asked Giblin about this admission on cross examination, and did not re-call their witness to the stand during their case. In fact, Giblin re-affirmed the accuracy of Bertin's recollection, when he added to the testimony at trial, to the effect that because Walter could not sign the waiver of liability forms, defendants could not accept his refusal of medical aid. (CA-280 at 462; CA-181 at 151)

D. Removal of Walter Green from his Home

The City employees were in the Green home for almost 90 minutes. (CA-685-6) In total, there were at least 8 officers present: two paramedics, two Fire Department EMS medics, one EMS lieutenant, two police officers and one police sergeant. (*Id.*) The police officers at the scene initially refused the requests of the EMS officers that they assist in removing Walter from his home. (CA-685, entries at 15:20:47; 15:22:01; 15:25:09 and 12) It was not until a police sergeant appeared on the scene and ordered

Walter Green's removal under threat of arrest that he was taken out of his home. (CA-685)

Walter Green suffered physical injuries as a result of his forcible and violent removal from his home. (CA 185 at 165-66; CA-207 at 256; CA-208 at 258-9; CA-286 at 486; CA-156 at 105-7) Arriving at the scene a few minutes after Walter had been physically removed, William Hill, the respiratory therapist, found the apartment in disarray, with things strewn on the floor. (CA-144 at 57) Mr. Hill had been summoned to the apartment by Susan Green in order to repair the ventilators. He had had a telephone conversation with Lt. Giblin during which he explained that he was on his way and would be there shortly. (CA-144 at 57) Hill was able to fix both machines within a matter of minutes. (CA- 144-145 at 60-61)

E. At the Hospital

Walter Green was taken to St. Luke's Roosevelt Hospital despite a request that he be taken to Columbia Presbyterian, where the ALS Center and all of his physicians were located. (CA-184 at 163) Walter arrived at St. Luke's and was seen by the resident physician, Dr. Tiffany Reiser at 4:50 p.m—approximately 40 minutes after Walter was forcibly removed from his home. (CA-758; CA-687; CA-685)

Dr. Reiser performed an evaluation of Walter. (CA-437) She was able to do so, despite having never before examined a person who could not speak or one

who had ALS, because instead of assuming that she knew what Walter needed, she actually looked at him, spoke to him, and observed his responses. Dr. Reiser found Walter to be alert and oriented, adequately oxygenated, and not hypoxic. (CA-435 at 888-90 and see CA-436 at 893-4) She advised Green to remain in the hospital because he was suffering from pneumonia. (CA-437 at 895) He eventually, though reluctantly, agreed to do so because of the overwhelming logistical obstacles to getting home. (CA-186-7 at 172-3; CA-209 at 263; CA-371 at 733)

In addition to the physical injuries, Walter also experienced severe emotional trauma that led to months of depression. (CA-210 at 266; CA-188 at 177) He testified at a video-taped deposition that was played to the jury (CA-750-2):

> I watched my wife get knocked to the floor and told to be handcuffed. I saw my daughter manhandled by large men who claimed to be helping. My home was violated, my self-respect crushed, and until then I did not understand the meaning of the word rape. I can't move, I saw myself being held, legs spread and strapped to a chair and being violated again and again, being held helpless against my will.
>
> I saw my wife's bloodied face and limping in pain, and red welts rising on my daughter's arms. All this in the name of good. Whose good? Surely not my family nor mine. I

couldn't grasp what was happening. I became hysterical.

In the hospital I couldn't look at my wife and children. I felt ashamed, and for the first time an utterly helpless man, worthless. And my twisted body would not be given any respect.

For months I couldn't close my eyes without seeing the horror of that day played before my eyes. I still wake up in a cold sweat with vivid nightmares of that day that will stay with me for the rest of my life.

Some days I have a hard time functioning. I become depressed very easily, and I have a hard time concentrating. I've doubled my sleeping.

I made plans for my demise with my Rabbi after that event, detailing everything so no one would have any say but me. If I was not able to be in control during life, I would certainly control in my death wishes.

I also remind my daughter, Nancy, with my personal wishes for my death until this incident. I really didn't even think about dying even though I had a fatal disease.

(CA-750-2)

Reasons for Denying the Petition

I. Petitioner Did Not Argue For A Blanket Exception To The ADA For Emergency Workers In The District Court Or The Second Circuit

During the 9 years this litigation was pending in the district court and Second Circuit, the City and Giblin raised many factual and legal arguments—but not the request for a blanket exemption from ADA liability for non-hospital emergency medical services officers that they raise here. Initially, in the district court in their motion for summary judgment, petitioners argued that they did not discriminate against Walter Green because the emergency medical services staff bore Walter no ill will, but merely wanted to help him. (*Green v. City of New York*, 2004 U.S.Dist. LEXIS 5 at 25-9 (S.D.N.Y. 2004)(decision of magistrate judge on petitioners' summary judgment motion) After reversal by the Second Circuit, at trial the City claimed that Walter Green was not competent to refuse treatment, relying on a paid expert who reviewed the facts long after the event and opined that Green must have been mentally compromised. In adopting the district court's charge to the jury, petitioners effectively stipulated that the ADA applied. (CA 495-7) Although the jury did not accept petitioners' argument that Green was not competent, the district judge did. The Second Circuit reversed the district court's judgment notwithstanding the verdict and

affirmed the jury's verdict. *Green v. City of New York, (Green II)* Appendix A at 5a (2d Cir. 2009)

After almost a decade of litigation, the City finally admits important facts that counsel repeatedly and vehemently denied below (for instance, that Walter Green was not given the evaluation of his refusal of medical services required under the City's own guidelines, Pet. Brief at *i*), but now suddenly claims that the ADA should not have applied to it at all: "Nor should the ADA apply under the far more exigent circumstances presented here." (Pet. Brief at 17) However, as this contention was not raised either in the district court or the Second Circuit, no record was developed. Neither the district court nor the Second Circuit ruled on this claim and, accordingly, under this Court's rulings, it should not now be the basis for review of the decisions of Second Circuit. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-3 (1998); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981)

II No Court Has Recognized Blanket Immunity From ADA Liability For Emergency Medical Workers

Even if petitioners had raised this claim below, this Court should not expend scarce resources to consider it because it is a sham argument. The cases relied on do not support an exception to ADA liability for emergency medical service workers and they deal with public safety exigencies wholly inapposite to the facts here. (See Pet. Brief at 13-18)

The Second Circuit's decisions in *Green I* and *II* that carefully evaluated the facts surrounding the incident are not at odds with the other circuits, which have invariably determined that a finding of discrimination requires an intensive factual review of all of the circumstances. Nor are the Second Circuit decisions contrary to this Court's decision in *Chevron U.S.A. v. Eschazabal*, which affirmed the necessity of individualized factual inquiry under an EEOC regulation. 536 U.S. 73, 85-6 (2002) No court has even remotely proposed the blanket exemption from ADA liability that the City seeks for its non-hospital emergency medical services workers.

Petitioner's argument that the ADA simply should not apply in some situations relies primarily on *Hainze v. Richards*, 207 F. 3d 795 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000) (Pet. Brief at 14), in which a mentally disabled plaintiff was found guilty of aggravated assault on a police officer after approaching the officer with a knife and failing to stop when ordered to do so. *Hainze*, 207 F. 3d at 797. Plaintiff's ADA claims were dismissed on two grounds: that plaintiff was not denied a service but, by his threatening conduct, himself caused the denial; and second, that a reasonable accommodation of plaintiff's disability need not occur in an on-site arrest until officers secure the area and safeguard their own and the public's safety. *Hainze*, 207 F. 3d at 801 The Fifth Circuit specifically limited the application of the holding to the specific facts of that case which dealt with an on-the-street response by a police officer to a reported disturbance of a man

wielding a knife. The court stated that the ADA's reasonable accommodation requirement does not apply until after officers have first secured "the safety of themselves, other officers, and any nearby civilians". *Hainz*, 207 F.3d at 801

Hainze is inapplicable on its facts: Walter Green did not commit a crime and dealing with him did not put the public or the officers at risk. Further, instead of carving out an exception to the ADA, *Hainze* arguably stands for the principle that the ADA does not "shield the disabled from being treated like other citizens who violate the law." *See Cyrus v. Town of Mukwonga*, 2009 U.S. Dist. LEXIS 34859 at 56 (E.D. Wis. 2009); *see also Bates v. Chesterfield*, 216 F. 3d 367, 373 (4th Cir. 2000)(given a finding of probable cause to believe plaintiff assaulted a police officer, the police stop, use of force and arrest "were not by reason of Bates' disability, but because of Bates' objectively verifiable misconduct.")

The Eleventh Circuit in *Bircoll v. Miami Dade County*, 480 F. 3d 1072, 1085-6 (11th Cir. 2007), a case also relied on by petitioners, specifically rejected the theory of an ADA exception derived from *Hainze*:

> As noted earlier, the Fifth Circuit in *Hainze* concluded that "Title II *does not apply* to an officer's on-the-street responses to reported disturbances or other similar incidents . . . *prior to* the officer's securing the scene and ensuring that there is no threat to human life." *Hanize*, 207 F. 3d at 801 (emphasis

added) In our view, the question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of Bircoll's disability. The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.

In other words, the question is whether, given criminal activity and safety concerns, any modification of police procedures is reasonable before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or officer's safety. The reasonable-modification inquiry in Title II-ADA cases is "a highly fact-specific inquiry." See *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1527 (11th Cir. 1997) (stating, in a Title I-ADA reasonable accommodation case, that "what is reasonable for each individual employer is a highly fact-specific inquiry that will vary depending on the circumstances and necessities of each employment situation"). We emphasize that terms like reasonable are relative to the particular circumstances of the case and the circumstances of a DUI arrest on the roadside are different from those of an office or school or even a police station. What is reasonable

> must be decided case-by-case based on numerous factors.

Bircoll at 1085 6 (emphasis in original)

The Fourth and Eleventh Circuits have held that ADA liability requires a fact based analysis. In *Bircoll v. Miami Dade County*, 480 F. 3d 1072 (11th Cir. 2007), the Eleventh Circuit found that the hearing impaired plaintiff in a driving under the influence ("DUI") stop had not suffered an ADA violation because the accommodation he sought for his disability would not have been reasonable under the circumstances of a police action.

In *Waller v. City of Danville*, 556 F. 3d 171 (4th Cir. 2009) the court found that the plaintiff's disability had been reasonably accommodated by the police in the context of a third party hostage situation. Plaintiff claimed that the police had failed to accommodate his mental illness while he held a woman hostage in her apartment, leading to a violent confrontation that left plaintiff dead. In response to the City of Danville's claim, pursuant to *Hainze*, that the ADA should not apply under the exigent facts of the case, the court noted that "[r]easonableness in law is generally assessed in light of the totality of the circumstances, and exigency is one of the circumstances that bears materially on the inquiry into reasonableness under the ADA." 556 F. 3d at 175 In *Loye v. County of Dakota*, 647 F. Supp. 2d 1081, 1088-90 (D. Minn. 2009) the district court found that the county was not required to provide hearing impaired individuals

with specific accommodations during an emergency clean up of mercury exposure because the county had effectively communicated with plaintiffs. 647 F. Supp. 2d at 1088-90

As these cases demonstrate, the ADA provides sufficient flexibility for fact-based inquiry without resort to a blanket exception. Unlike the facts in *Hainz*, *Waller*, *Bircoll*, *Bates*, *Loye* (or *Brigham City v. Stuart*, 547 U.S. 398 (2006), *Mincey v. Arizona*, 437 U.S. 385 (1978), *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981), *Brandenburg v. Ohio*, 395 U.S. 444, (1969)(*per curiam*), and *New York v. Quarles*, 467 U.S. 649 (1984), Pet. Brief at 13-14), the facts at issue here did not involve criminal activity or the safety of officers or third persons. The public was not endangered by Walter Green's refusal of further medical care. In fact, EMS supervisors joked on the 911 tape that the officers on the scene manually ventilating Green would be entitled to a lot of overtime pay. (CA-738) Walter Green was the only person arguably at any risk on March 19th but as a competent person, he could and did choose to assume the risk of rejecting further care from the EMS officers. *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 270, 278 (1990)("a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . .. The logical corollary of the doctrine of informed consent is that the patient generally possesses the

right not to consent, that is to refuse treatment."; *see also Green I*, 465 F. 3d at 84. [1]

III. Petitioner's Proposed Exception Rests on Impermissible Stereotyping

Petitioner's proposed 'exigent circumstances exception' is just another excuse for discriminating against a class of people based on "untested and pretextual stereotypes". *See Chevron U.S.A. v. Eschazabal*, 536 U.S. 73, 85 (2002) There is no factual support for petitioners' claim that communicating with a person suffering speech disability would be any more time consuming than with a non-disabled person. A refusal of medical assistance under the City's established guidelines requires EMS officers to obtain information and perform an assessment, whether it is a disabled or non-disabled person. This process takes longer than a simple EMS pick up of a patient would take, but there is no indication that accommodating Green's disability by accepting his computer generated statements (either typed or audibly 'spoken' to telemetry or to the officer in charge, Lt. Giblin) or

[1] As evidenced by the extraordinary measures he had in place to maintain his life, Green clearly was not seeking to die on March 19th. he just wanted to maintain his own treatment at home, provided by family members under the supervision of his physicians and with the help of his respiratory technician. Accordingly, petitioners' reliance on cases involving termination of life support is misplaced. Neither the legal nor factual issues in the termination of treatment cases are "quite similar to the one at hand" (Pet. Brief at 16) and none of the decisions relied on is at odds with *Green I or II*

even by using his eye blink 'yes/no' system would have taken any longer than a customary verbal interchange with a speaking but medically unsophisticated person.

Recognizing that they are proposing an impermissibly paternalistic solution, petitioners nonetheless argue fancifully here that the use of 'do not resuscitate' or 'medical orders for life sustaining treatment,' if executed, would "reduce the risk that an exigent circumstances exception to the ADA would expose non-speaking disabled emergency patients to unwanted and paternalistic medical intervention." (Pet. Brief at 19) Petitioners do not explain how an order not to resuscitate or perform extraordinary life support — to deal with patients who are not conscious — would prevent paternalistic discrimination. Orders providing for cessation of medical interventions would have had no application in facts such as these, nor would they have assisted EMS workers to evaluate the desires of the fully conscious, alert and communicating Walter Green who didn't want to die, but just wanted to stay home. Further, there is no explanation offered in the brief for the discordant fact that petitioner Giblin admitted at trial that he would not have honored a previously executed medical power of attorney (surely a far more appropriate document for Walter Green than a 'do not resuscitate order') giving Susan Green authority to act on her husband's behalf and Walter Green would still have been removed from his home because a medical power of attorney would not have been recognized outside a hospital and

"there were no trained medical people in the home." (CA-237 at 374-5)

Indeed, Walter Green was a striking example of the innate power of people with disabilities. Although he lost the ability to speak audibly, assistive technology and eye blinks allowed him to communicate cogently with the world. On March 19, 2000, the day he was injured by employees of the City of New York as a result of their discriminatory conduct, he was just as capable of stating his wishes and exercising his rights as any justice of this Court or lawyer in this case.

The decisions of the Second Circuit ensure that the ADA is applied as Congress intended and prevent government agencies from denying services to people with disabilities because they cannot audibly communicate their wishes. This case involves a fundamental matter of personal autonomy: the right to accept or refuse medical treatment.

A. Paternalism is a Social Ill the ADA Sought to Eliminate, Not Excuse

Congress was keenly aware that paternalism underlay most discrimination against disabled persons. "Paternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals." H.R. Rep. No. 101-485, pt. 2 at 74, reprinted in 1990 U.S.C.C.A.N. at 356. The legislative history of the

law made clear that "nothing in the ADA is intended to permit discriminatory treatment on the basis of disability, even when such treatment is rendered under the guise of providing accommodation, service, aid or benefit to the individual with disability." *Id.*, pt. 3, at 71, reprinted in 1990 U.S.C.C.A.N. at 494. The Congressional record focused on replacing paternalism with respect for personal autonomy and choice, and cited the example of a public accommodation that has a policy of sending people who are blind to the front of a line. "[A] blind individual may choose not to avail himself or herself of that right. . . ." H.R. Rep. No. 101-485, pt. 3, at 72, reprinted in 1990 U.S.C.C.A.N. at 495. Similarly, a "blind individual may choose to decline to participate in a special museum tour that allows persons to touch sculptures in an exhibit and instead tour the exhibits at his or her own pace with the museum's recorded tour." *Id.* Even with the best intentions, a museum requiring a blind individual to participate in the special tour would violate the ADA. Similarly, the Second Circuit in *Green I* recognized that the ADA would be violated where a government body acted with "an intent based on a stereotypical view of the abilities of a seriously physically handicapped individual." 465 F. 3d at 78

Stereotypes about people with disabilities, paternalism and pity are rooted in notions of superiority and "the assumption that people with disabilities are intrinsically inferior and unable to take responsibility for their own lives." James I. Charleton, *Nothing About Us Without Us*, 52 55

(1998) The violation and degradation caused by such stereotypes were made evident to the jury through Walter's testimony about how he felt after being forcibly removed from his home: "I become depressed very easily, and I have a hard time concentrating. I've doubled my sleeping. I made plans for my demise with my Rabbi after that event, detailing everything so that no one would have any say but me. If I was not able to be in control during life, I would certainly control in my death wishes." (CA-750-2)

B. Paternalism Does Not Justify Denying People with Disabilities the Right to Accept or Refuse Medical Treatment Based on Their Mode of Communication

A competent person at liberty has a constitutionally protected interest in controlling what is done to their own body, and is therefore entitled to refuse medical treatment. *Cruzan*, 497 U.S. at 278 (1990); *Green I*, 465 F. 3d at 84; *Rivers v. Katz*, 67 N.Y.2d 485, 493(1986)("In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.")

Under the ADA, an individual's right to refuse medical treatment offered by a government agency is not dependent on the ability to express his or her desires with vocal chords. As the Second Circuit recognized in *Green I*, if an agency has guidelines for the refusal of treatment, they must be designed to permit people who are conscious and cogent, but unable to vocalize, to exercise the right to refuse. Moreover, the refusal of the agency (through its employees) to apply those guidelines in a non-discriminatory manner, even if the agency's employees believe their actions are motivated by kindness, protection, or presumptions about what is "best" for the person with a disability, is unquestionably actionable discrimination. *Green I*, 465 F.3d at 76-77

C. Among the Millions of Americans with Disabilities, Many Use Technological Assistance to Communicate

Walter Green was one of millions of Americans who must use assistive technology to communicate and perform daily functions, including interaction with medical personnel. Petitioners proposed exception would effectively deny such persons, because they do not communicate with spoken words, the fundamental right to refuse compelled medical treatment.

At the time of the enactment of the ADA in 1990, approximately 43 million Americans had one or more physical or mental disabilities. 42 U.S.C §

12101(a)(1) Recent survey and census data indicates that number has risen to over 50 million and will continue rising due to increased life expectancy and the recent spike in the number of children and teenagers with disabilities.[2] More than 4.7 million Americans aged 65 years or older have a sensory disability involving sight or hearing, and more than 6.7 million people with disabilities have difficulty going outside their home.[3] According to a 2005 census survey, the New York City metropolitan area has 268,114 residents who live independently (not in group quarters, dorms, or institutional settings) and have a "sensory disability." [4]

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[2] Within Our Reach: Findings and Recommendations of the National Task Force on Technology & Disability, National Task Force on Technology and Disability, at 11 (2004)(available at http://222.ntfd.org/ntftd.pdf) Over 24 million people are classified as having a severe disability. Prevalence of Disability in America, National Center on Physical Activity and Disability (Dec. 21, 2005)(available at http://www.ncpad.org/research/fact_sheet.php?sheet=189&section=1385).

[3] Issues in Creating Livable Communities for People with Disabilities: Proceedings of the Panel, National Council on Disability, at 5 (Oct. 1, 2007)(available at http://www.ncd.gov/newsroom/publications/2007/pdf/livable_communities_10-01-07.pdf)

[4] See 2005 American Community Survey, U.S. Census Bureau (available at http://factfinder.census.gove/servlet/DTTable?_bm=y&_state=dt&_context=dt&_ds_name=ACS_2005_EST_G00_&_mt_name=ACS_2005_EST_G2000_B99918&tree_id=305&_redoLog=true&_caller=geoselect&_

Assistive technology available to people with disabilities for communication has improved access to public life, and our laws reflect the importance of respecting these different forms of communication. For example, every state is now required to have a "Speech to Speech" ("STS") toll-free telephone relay service. 47 U.S.C. §225 (f)(2) Available 24 hours a day, seven days a week, the service enables individuals with speech disabilities who have difficulty being understood on the telephone to call STS, where a "Communications Assistant" trained to recognize different speech patterns repeats the person's words to the intended recipient of the person's call.[5]

Another mechanism for communication is the one that Walter Green used: a specially designed computer which, after he typed one or two letters with his one active finger, would provide a choice of likely works for him to select. When Mr. Green would complete his sentence or thought, a voice on the computer would state the typed words. (CA-160 at 124; CA 162 at 30) Stephen Hawking, a renowned scientist and author who is almost entirely paralyzed as a result of ALS, uses similar

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[5] Speech to Speech Services. Federal Communications Commission)(available at http://www.fcc.gov/cgb/dro/sts.html).

technology. [6] "Widely considered one of the world's most brilliant theoretical physicists since Albert Einstein, Hawking does his talking—even conducting seminars at Cambridge University—through a computerized voice synthesizer. He picks out words on a computer screen, and an electronic voice 'speaks' what he writes." [7]

Assistive technology can range from the simplistic to the futuristic. "Computers have led the revolution. Hundreds of companies, from computer giants to attic innovators, have produced thousands of software and hardware aids that can mitigate the problems posed by even the most severe physical disability. There are computer monitors with magnified, large type letters; key-boards with oversized keypads; and printers that print in Braille. Someone unable to grip a pen and write can use a computer. If fingers lack the muscles to type, a computer key can be struck with a mouthstick clenched between the teeth or with a headstick strapped to the forehead . . ." [8]

Consistent with the broad consensus of a public policy that favors access for people with

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[6] John Williams, Tech Opens Stephen Hawking's Universe, *Business Week Online* (June 20, 2001)(available at http://www.businessweek.com/bwdaily/dnflash/jun2001/nf20010620_067.htm)

[7] Joseph P. Shapiro, *No Pity* 229 (1993)

[8] *Id.* At 220

disabilities, federal and state governmental bodies have enacted laws to promote the use of assistive technologies. The Hearing Aid Compatibility Act of 1988 requires all telephones made or imported for use in the United States to be hearing aid compatible. 47 U.S.C. § 610 The Technology-Related Assistance for Individuals with Disabilities Act of 1988 was enacted to establish a system for providing "financial assistance to states to help them develop and implement a consumer-responsive state-wide program of technology-related assistance for individuals of all ages with disabilities." Pub. L. No. 100-407, 102 Stat. 1044 (repealed 1998) Congress subsequently amended and replaced that legislation with the Assistive Technology Act of 2004, which extends federal funding for state programs to improve the provision of assistive technology to disabled persons. See 29 U.S.C. § 3001 *et seq.* Further, the Telecommunications Act of 1996 requires telecommunications manufacturers and service providers to make their equipment and services accessible to people with disabilities, if readily achievable. 47 U.S.C. §255

Clearly, Congress recognized the need to develop and adopt assistive technology, and as a result there are many people with disabilities now "speaking" in non-traditional ways with the assistance of such technology. This fact highlights the injustice of the petitioners' treatment of Walter Green. Green exemplifies those who have overcome disabilities and are able to live independent lives with the aid of technology. When a person with

disabilities uses this technology to exercise vital constitutional rights, as Walter did, no agency should be allowed to disregard that exercise because the person spoke through a machine, rather than through vocal cords or the written word. Petitioners' argument that rights exercised through assistive technology should be freely ignored by government agencies, subverts Congress's intentions and should be rejected by this Court.

D. The Jury's Verdict is Due Special Deference

Under our system, where the right of jury trial is constitutionally protected, "the jury, not the court . . . is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instruction, and draws the ultimate conclusion as to the facts." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944) In *Green II*, the Second Circuit specifically "defer[red] to the jury's credibility determinations" and concluded that the district court's substitution of its own judgments for that of the jury's 'cannot be located within the range of permissible decisions." (*Green II*, Pet. Appendix A at 4a-5a)

Allowing jurors' evaluation of the evidence to prevail is particularly important where discrimination against people with disabilities is found. The ADA represents a broad consensus—following a long history of attempts to draft an effective law addressing the rights of disabled

persons—that discrimination, whether by failure to accommodate or by benign paternalism, is unacceptable. *Helen L. v. DiDario*, 46 F. 3d 325, 330-331(3d Cir. 1995) Congress, as direct representatives of the public, expressed that consensus in the ADA.

The consensus did not include a blanket waiver of ADA compliance for emergency medical services workers, and respondents respectfully urge this Court to deny petitioners' belated application to engraft one onto the statute now.

Conclusion

For all the foregoing reasons, respondents respectfully request that the petition for writ of certiorari be denied.

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